No. 19-35470

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE GRUBER and MARK RUNNELS,
Appellants,
v.

OREGON STATE BAR, a public corporation, CHRISTINE CONSTANTINO, President of the Oregon State Bar, HELEN HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar.
Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:18-cv-1591-JR
Hon. Michael H. Simon, District Judge

APPELLANTS' OPENING BRIEF

Michael L. Spencer, OSB #830907
403 Main St.
Klamath Falls, OR 97601
(541) 883-7139
mlslaw@live.com

Attorney for Appellants Gruber and Runnels

TABLE OF CONTENTS

Page

ADDENDUM

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Regulations

Rules

Other Authorities

JURISDICTIONAL STATEMENT

This case is an appeal of the District Court's dismissal of the action and final judgment of the United States District Court for Oregon. The District Court had subject matter jurisdiction over the civil action based on 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. Final judgment was entered by the District Court on May 11, 2019.

Appellant filed a Notice of Appeal on May 30, 2019. The appeal is from a judgment of the District Court that disposed of all parties' claims.

STATEMENT OF ISSUES PRESENTED

Whether the holding in *Janus v. AFSCME, et al,* ___ US ___, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018) applies to the facts of the case at hand, making it a violation of Appellants' right to practice their profession on condition they pay dues to the Oregon State Bar.

Whether the infringements of Appellants' fundamental First and Fourteenth Amendment rights of freedom of association and non-association by the Oregon State Bar pass constitutional scrutiny.

Whether the Oregon State Bar is entitled to Eleventh Amendment immunity.

STATEMENT OF CASE

Appellants are attorneys who have been admitted to practice law in the State

of Oregon and are members of the Oregon State Bar. They are required to pay various dues, fees and assessments to be members of the Oregon State Bar.

The Oregon State Bar engages in various types of speech, including political speech. The Appellants object to being required to be members of an organization which engages in speech that they do not agree with but cannot engage in their profession without being members of the Oregon State Bar. There is no means by which Appellants can "opt out" of membership in the Oregon State Bar and continue to be able to practice law in the State of Oregon.

PROCEDURE

On August 29, 2018, Appellants filed a civil Complaint for Declaratory and Injunctive Relief. (ER-4) On October 22, 2018, Respondents filed Defendants' Motion to Dismiss the Amended Complaint. (ER-5) On November 5, 2018, Appellants filed a Motion for Partial Summary Judgment. (ER-5) On January 3, 2019, Appellants filed their Amended Complaint for Declaratory and Injunctive Relief under Fed. R. Civ. P. Rule 15(a)(1)(B). (ER 7). The amended complaint added as Defendants Christine Constantino as President of the Oregon State Bar and Helen Hierschbiel as Chief Executive Officer of the Oregon State Bar. On January 9, 2019, Respondents filed Defendants' Motion to Dismiss the Amended Complaint. ER 79. On April 1, 2019, Magistrate Judge Jolie A. Russo issued her

Findings and Recommendations and on May 24, 2019 the District Court adopted the Magistrate's Findings and Recommendations (ER-8) on the motion to dismiss granting the joint defendants' request for dismissal. (ER 8). Appellants' Notice of Appeal was filed on May 30, 2019. (ER-8)

SUMMARY OF ARGUMENT

Under *Janus v. AFSCME* Appellants' right to practice law cannot be conditioned on their payment of dues to the Oregon State Bar for speech with which they do not agree.

Appellants' fundamental rights of non-association the First and Fourteenth Amendments are being infringed by requiring them to be members of the Oregon State Bar. This infringement fails to pass strict constitutional scrutiny.

The Oregon State Bar is not an arm of the State of Oregon entitled to Eleventh Amendment immunity.

STANDARD OF REVIEW

Dismissal for failure to state a claim under Rule 12(b)(6) is reviewed de novo. *Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016), cert. denied sub nom., *Wilson v. Sessions*, 137 S. Ct. 1396 (2017).

> "De novo review means that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below.' *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)." *Dawson v. Marshall*, 555 F.3d 798, 801 (9th Cir. 2009).

The complaint must include facts that "state a claim to relief that is plausible on its face." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1031 (9th Cir. 2016) (citations omitted).

And, most important: "The court must accept as true the facts alleged in a well-pleaded complaint, but mere legal conclusions are not entitled to an assumption of truth." *Id*. (citations omitted).

ARGUMENT

I. APPELLANTS' RIGHTS TO FREEDOM OF SPEECH HAVE BEEN INFRINGED.

Appellants are aware of the Supreme Court's and this Court's holdings in *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997) and *Eugster v. Washington State Bar Ass'n*, 684 F. App'x 618, 619 (9th Cir.), cert. denied, 137 S. Ct. 2315 (2017). However, to preserve their right to appeal an adverse decision from this Court on this issue, Appellants are obligated to adequately raise this issue in the 9th Circuit.

In the cases of *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) and *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1(1990) Supreme Court allowed integrated bars. However, the Supreme Court's recent decision in *Janus v. American Federation of State, County and*

Municipal Employees, et al shows that those cases are no longer good law.

Lathrop, supra, involved a challenge to the establishment of an integrated bar for attorneys in Wisconsin as is provided for in Oregon law. The Supreme Court upheld the requirement that attorneys in Wisconsin could be required to be members of the bar and be required to pay dues to the bar.

The broad approval of an integrated bar was modified somewhat in 1990 when the Supreme Court was asked to determine if a bar could use compulsory fees paid by attorneys for political or ideological purposes. In *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1(1990), the Supreme Court held that dues required to be paid by attorneys to a bar could not be used for ideological purposes, citing it's case of *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) as the basis for that decision. The Supreme Court held:

> "Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity."

Keller at 13. Thus, it is clear that the previous cases decided by the United States

Supreme Court were entirely based upon it's decisions relating to the union shop decisions.

On June 28, 2018, the United States Supreme Court decided the case of *Janus v. American Federation of State, County and Municipal Employees, et al* in which it specifically overruled the *Abood* case.

> "We upheld a similar law in *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. Abood was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since Abood was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that Abood has countenanced for the past 41 years. Abood is therefore overruled."

Janus Slip Opinion at 2460. The Supreme Court went on to say:

> "The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U. S. 705, 714 (1977); see *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec., supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson

> memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943)."

Janus at 2463.

The present case involving compulsory payment of dues, fees and assessments to maintain membership in the Oregon State Bar in order to engage in their State regulated profession is no different. The Oregon State Bar has clearly engaged in political and ideological speech that the Appellants in this case object to.

However, just because Oregon laws which compel the subsidy of the Oregon State Bar's ideological speech impinge on the Appellants' First Amendment rights, it does not automatically follow that those laws are unconstitutional. Instead, the Court must determine if the laws pass the required level of scrutiny to allow that impingement.

> "Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox, supra; Harris, supra; Friedrichs v. California Teachers Assn*., 578 U. S. ___ (2016) (per curiam) (affirming decision below by equally divided Court).
>
> In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the

> compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), prior precedent in that area, specifically *United Foods, supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U. S., at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must"serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid*. (internal quotation marks and alterations omitted)."

Janus at 2464.

In the cases decided previously regarding integrated bar's, the court utilized the "balancing test" to determine if the infringement on the associational rights of attorneys could be allowed. Justice Black, in his dissenting opinion in *Lathrop, supra*, stated:

> "The first of these is that the use of compelled dues by an integrated bar to further legislative ends contrary to the wishes of some of its members can be upheld under the so-called 'balancing test,' which permits abridgment of First Amendment rights so long as that abridgment furthers some legitimate purpose of the State. Under this theory, the appellee contends, abridgments of speech 'incidental' to an integrated bar must be upheld because the integrated bar performs many valuable services for the public. As pointed out above, the Wisconsin Supreme Court embraced this theory in express terms. And the concurring opinion of Mr. Justice HARLAN, though not purporting to distinguish the Street case, also adopts the case-by-case 'balancing' approach under which such a distinction as, indeed, any desired distinction is possible."

Lathrop at 871.

Thus, the key holding in *Janus, supra*, is that the use of the "balancing test"

to determine if governmental action which infringes on an individual's freedom of speech and freedom of association is to be allowed was rejected.

The Supreme Court stated:

> "The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See post, at 4 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*."

Janus at 2465.

All 50 States and the District of Columbia regulate the practice of law. Almost half of those States do not require membership in a Bar but instead provide for a licensing and disciplinary system with a voluntary bar association. Thus, in almost half of the jurisdictions regulating the practice of law in this Country, having a license system rather than mandatory membership in a bar accomplishes the compelling State interest of regulating the legal profession and improving the quality of legal services.

The State of Oregon is able to regulate other professions, including the medical profession, through a licensing system and the majority of the jurisdictions which regulate the practice of law find it adequate to use a licensing system, then

how can Oregon's system of requiring membership in the Oregon State Bar, coupled with compulsory subsidies, be the only means to accomplish the State's interest? Certainly, a licensing system where the licensing agency does not engage in political or ideological speech would and does accomplish those goals. The Oregon State Bar should appropriately become a professional trade organization, such as the Oregon Medical Association, and continue to provide valuable services to both those attorneys who voluntarily choose to associate with it and to the general public.

The Supreme Court has stated:

> "Contrary to the view of the Ninth Circuit panel majority, we did not call for a balancing of the "right" of the union to collect an agency fee against the First Amendment rights of nonmembers. 628 F.3d, at 1119-1120. . . . Far from calling for a balancing of rights or interests, Hudson made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. 475 U.S., at 303, 106 S.Ct. 1066. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest."

Knox, et al v. Service Employees International Union, Local 1000, 132 S. Ct. 2277, 183 L.Ed.2d 281, 567 U.S. 298, 313 (2012).

As indicated, the cases cited all utilize the lesser "exacting scrutiny" test and show that Oregon's approach to the regulation of the practice of law is ". . .

significantly broader than necessary to serve. . ." the interest of the State in regulating the practice of law. *Ibid.* A licensing structure, as used by many other States and used by the State of Oregon for all other professions, would have no impact upon the Plaintiff's associational rights since they would not become a "member" of the licensing entity.

The Bar argues that the Supreme Court's dicta in *Harris v. Quinn*, ___ U. S. ___, 134 S. Ct. 2619, 189 L.Ed.2d 620 (2014) should control this case. However, *Harris* did not engage in any scrutiny of the Illinois law. As to dicta regarding *Keller, supra,* the Court stated:

> "This decision fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. **The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services."** *Ibid*. States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*." (Emphasis added)

Id. at 2644. In other words, the Supreme Court looked solely to the "compelling interest" portion of the test, not to whether the law requiring bar membership passed any type of scrutiny.

This is further supported by that portion of the *Harris* decision which stated:

> "**Public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral.** See *Rosenberger v.*

> *Rector* and *Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)." (Emphasis added)

Harris at 2644. This quote clearly shows that all the *Harris* Court was considering was the "compelling interest" portion of the test.

The issue now is whether the requirement that attorneys be members of the Oregon State Bar and contribute to the speech of the Oregon State Bar can pass either the 'strict scrutiny" test applicable to most speech issues or the "highest scrutiny" test applicable to commercial speech, if that is what the Bar engages in.

II. APPELLANTS' CLAIM THAT THEIR FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION HAVE BEEN INFRINGED IS NOT PRECLUDED BY *KELLER*.

The District Court, in accepting the Magistrate's recommendations, failed to consider Appellants' argument that their right to Freedom of Association, as protected by the First Amendment, was violated by Oregon's requirement that they must be members of the Oregon State Bar to practice law.

This issue was not decided in *Keller*:

> "In addition to their claim for relief based on respondent's use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. See supra, at 5-6. This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*. Petitioners challenge not only their "compelled financial support of group activities," see supra, at 9, but urge that they cannot be

> compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*. **The California courts did not address this claim, and we decline to do so in the first instance.** The state courts remain free, of course, to consider this issue on remand." (Emphasis added)

Keller 496 U.S. at 17.

Since *Keller* did not decide the Freedom of Association issue, *Agostini*, *supra*, is inapplicable and this Court is not precluded from addressing it.

This issue was specifically raised in paragraph 13 of Appellants' Complaint (ER-45) and argued before the Magistrate by one of the attorneys representing Plaintiffs in the cases. (ER-40). The issue was therefore preserved for this appeal.

The Supreme Court has stated:

> "The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec., supra*, at 12"

Janus at 2463

> "The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. (Citations omitted)."

Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)

In other words, the test to determine if a regulation which forces an association is allowable under the First Amendment is the exact test set out in *Janus*. As argued above, there is no issue that the State of Oregon has a compelling State interest in regulating the practice of law. The issue is whether the means chosen by the State of Oregon ". . . cannot be achieved through means significantly less restrictive of associational freedoms." As shown above, there certainly is a factual issue which would preclude dismissal of this allegation.

III. THE OREGON STATE BAR IS NOT AN ARM OF THE STATE OF OREGON ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The District Court also adopted the Magistrate's Recommendations and dismissed the Oregon State Bar on Eleventh Amendment grounds. This dismissal incorrectly interpreted the 9th Circuit's decision in *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). In *Mitchell*, this Court set out five factors to determine if an entity is an "arm of the State' and therefore entitled to Eleventh Amendment Immunity.

Although state agencies are generally immune from suit in federal court, "an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991). To determine whether an entity is an arm of the

state, courts in this Circuit apply *Mitchell's* five factor test. See, e.g., *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005) ("In the Ninth Circuit, we employ a five-factor test to determine whether an entity is an arm of the state."); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1181 (9th Cir. 2003) ("These factors must be analyzed in light of the way [state] law treats the governmental agency") (internal marks omitted). Under that test, a court must weigh:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Mitchell, 861 F.2d at 201. In this case, contrary to the Recommendation's analysis, all five factors weigh against Eleventh Amendment immunity for the OSB.[1]

A. A money judgment against the OSB would not be satisfied out of

[1]The Recommendation cited several decisions that stated that the OSB was entitled to Eleventh Amendment immunity, but those decisions did not perform *Mitchell*'s five-factor analysis and, in any event, are district court opinions, unpublished, or both, and therefore do not bind the Court in this case. *See* Recommendation 11, citing *Eardley v. Garst*, No. 99-36057, 232 F.3d 894, 2000 WL 1029087 (9th Cir. 2000) (unpublished table opinion); *Hartfield v. Or. State Bar*, No. 3:16-cv-00068-ST, 2016 WL 9225978, at *1 (D. Or. Jan. 15, 2016), *report and recommendation adopted*, 2016 WL 9226386 (D. Or. Feb. 16, 2016), *aff'd*, 671 Fed. Appx. 456 (9th Cir. 2016); *Coultas v. Payne*, No. 3:12-cv-1132-AC, 2012 WL 6725845, at *3 (D. Or. Nov. 27, 2012), *report and recommendation adopted*, 2012 WL 6726247, at *1 (D. Or. Dec. 27, 2012); *Weidner v. Albertazzi*, No. 06-930-HO, 2006 WL 2987704, at *1 (D. Or. Oct. 13, 2006); *Erwin v. Oregon ex rel. Kitzhaber*, 231 F.Supp.2d 1003, 1007 (D. Or. 2001), *aff'd*, 43 Fed. Appx. 122 (9th Cir. 2002)). In the absence of binding precedent, *Mitchell* requires the Court to conduct its own analysis of the five factors.

state funds.

The first Mitchell factor weighs against immunity because a judgment against the OSB would not be paid out of state funds. "[W]hen a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity." *Durning*, 950 F.2d at 1425–26; see also *Hyland v. Wonder*, 117 F.3d 405, 414 (9th Cir. 1997) (defendants not immune under Eleventh Amendment when they did not present "any evidence that the state would be liable for the judgment").

The Supreme Court and the Ninth Circuit have found the first *Mitchell* factor to be the most important: Because the "impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury … the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 48 (1994) (citations omitted); see also *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1041 (9th Cir. 2003) ("[T]he first *Mitchell* factor is the most important component in establishing Eleventh Amendment immunity." (citations omitted)); *Durning*, 950 F.2d at 1424 (same).

Here, this most important factor weighs against immunity because a money judgment against the Bar would not be satisfied out of state funds. See ORS

9.010(6). The Recommendation correctly acknowledged this but then downplayed the factor's importance, apparently because it found that "the Bar performs essential governmental functions including the collection of fees to perform those functions" and that a judgment against the OSB "would come from the Bar's collection of fees that is made possible because the State authorized the Bar to collect those fees." Recommendation at 12-13. The Recommendation erred in relying on those facts because they have nothing to do with the first *Mitchell* factor, which is concerned only with protecting state treasury funds from federal-court judgments. See *Hess*, 513 U.S. at 48. Of course state law may charge entities, such as local governments, with certain functions and authorize them to collect revenue, but that does not make those entities' funds "state funds" for purposes of the first *Mitchell* factor. *Cf. Beentjes*, 397 F.3d at 776, 778-81 (first factor weighed against immunity for pollution control district, even though the district was created by state law and the state collected revenue on its behalf, because judgment would not be paid out of "state funds").

The Recommendation erred in citing a Seventh Circuit decision in which, supposedly, "the effect on the state treasury was the least important factor" in determining whether an entity had Eleventh Amendment immunity. (ER-24 n.3) (citing *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1402 (7th Cir. 1993)). In fact,

Crosetto does not describe this as the "least important factor" but merely says that it may not be decisive. 12 F.3d at 1402. Indeed, the court was specific in telling the district court that "whether a judgment against the State Bar would ultimately be paid by the state's treasury" would be "relevant" to its inquiry on remand. *Id*. If *Crosetto* had deemed this factor the "least important," that would have directly contradicted Supreme Court and Ninth Circuit precedent establishing this as the most important factor. See *Hess*, 513 U.S. at 48; *Savage*, 343 F.3d at 1041.[2]

The Recommendation also erred in concluding that "as a practical matter, plaintiffs' success in these actions will impact the State treasury" because supposedly "the Oregon Supreme Court would be left to carry out the regulatory function which would certainly impact the State's funding". Recommendation at 13 n.4. First, this is irrelevant to the *Mitchell* analysis, which is concerned only with "whether a money judgment would be satisfied out of state funds." 861 F.2d at 201 (emphasis added). Here, Plaintiffs only seek refunds of mandatory dues they paid, which—it is undisputed—would not be paid out of the state treasury. Compl. (Dkt. 1) ¶ 15.

[2]If anything, *Crosetto* shows that the Recommendation erred in recommending dismissal of Plaintiffs' claims against OSB under Rule 12(b)(1) before the parties could develop a factual record. The court stated that whether a particular bar association "is vested with sufficient state characteristics to qualify for sovereign immunity is a factual question … that cannot be answered" without a developed record on that issue and remanded the case to the district court for further proceedings. *Crosetto*, 12 F.3d at 1402.

Second, the Recommendation had no basis for concluding that granting Plaintiffs declaratory and injunctive relief would impact the state treasury. There is no evidence before the Court on this point, but the experience of other states shows that the Recommendation's conclusion is incorrect. If Plaintiffs prevail, Oregon could still compel lawyers to pay for the cost of their own regulation, just as the many states that currently lack a mandatory bar association do, through either: (1) a fee paid to the Oregon Supreme Court, see, e.g., Ohio Gov. Bar R. VI § 14 (Addendum-20); or (2) as in California and Nebraska, a fee paid to a bar association that is limited to using mandatory regulatory fees for specified regulatory activities that do not include political or ideological speech. See *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb*., 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, Newly Formed California Lawyers Association Excited to Step Forward, ABA Journal, Apr. 30, 2018. (Addendum-23)

The Court should therefore conclude that the first *Mitchell* factor weighs against Eleventh Amendment immunity.

B. The OSB does not perform central government functions.

The Recommendation also erred in concluding that the second *Mitchell* factor—whether the OSB performs a central governmental function—favors

immunity. See (ER-25) This factor weighs against immunity because the OSB performs independent corporate functions with minimal state control.

> "In assessing the second *Mitchell* factor … [a court] evaluate[s] whether the [entity] addresses a matter of statewide rather than local or municipal concern, and the extent to which the state exercises centralized governmental control over the entity."

Beentjes, 397 F.3d at 782 (internal marks and citations omitted). Where some of an entity's activities may involve a central government role but others do not, this factor may not weigh for or against immunity. See, e.g., *Gressett v. Cent. Ariz. Water Conservation Dist.*, No. CV 12-00185-PHX-JAT, 2012 WL 3028347, at *3 (D. Ariz. July 24, 2012) (where entity acted "[i]n some ways … in a central government role" but also conducted activities "not usually assigned to the central government," second factor did not indicate whether it should be treated as an arm of the state).

The Supreme Court has recognized that a bar association is not a typical government agency, does not perform key governmental functions related to regulating the practice of law, and therefore is not entitled "to the treatment accorded a governor, a mayor, or a state tax commission" under federal constitutional law. *Keller v. State Bar of Cal.*, 496 U.S. 1, 11 (1990). In *Keller*, the Court observed that the State Bar of California "is a good deal different from most other entities that would be regarded in common parlance as

'governmental agencies.'" *Id*. It is funded primarily by members, not taxpayers, and its "services," however valuable, "are essentially advisory in nature": it "does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct" because "[t]hose functions are reserved by California law to the State Supreme Court." *Id*. It is the same in Oregon: while the OSB may make recommendations, the Oregon Supreme Court is not bound to accept them and it, not OSB, is the body actually responsible for admitting attorneys (ORS 9.210(2), 9.250), accepting attorney resignations (ORS 9.261), adopting rules of professional conduct (ORS 9.490), approving application fees (ORS 9.210(3)), disciplining attorneys (ORS 9.536), and approving rules of procedure for investigations of attorneys and bar applicants (ORS 9.542). Further, criteria for bar admission and attorney discipline are set by statute, not by the OSB. See ORS 9.220, 9.527. The Recommendation's statement that the Oregon Supreme Court's retention of authority in these matters makes OSB's activities no "less governmental in form," (ER-26 n.5), is erroneous because it is at odds with *Keller*, which concluded that the California Supreme Court's ultimate authority in these areas rendered the State Bar of California unlike a government agency, and analogous to a public-sector union, for federal constitutional purposes. See Keller, 496 U.S. at 11.

Otherwise, the OSB mostly conducts its activities independently, not under centralized state control. It has complete autonomy in determining how the OSB's general responsibilities are carried out, which weighs against a finding that it performs a "centralized governmental" function. See, e.g., *Beentjes*, 397 F.3d at 783 & n.9; *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 101 (1st Cir. 2002) (assessing, among other things, "whether the state exerts control over the agency, and if so, to what extent"). OSB acts under the management and control of its Board of Governors—elected by OSB's active members—not the state, which also weighs against such a conclusion. ORS 9.025, 9.040. The Board appoints the OSB's Chief Executive Officer. ORS 9.055. The Board is charged with the executive functions of the OSB, and the Board has the power to adopt, alter, amend, and repeal bylaws related to the regulation and management of the OSB. ORS 9.080. Under the Board's supervision (alone), the OSB's CEO implements, administers, and supervises the OSB's operation and program activities. OSB Bylaws § 2.1(a). The Board operates as a review body, a supervisor of top management performance and a representative body of all members. Bylaws § 2.1(b). The Board may amend the OSB's responsibilities and Bylaws without Judicial Department review or concurrence. See Bylaws § 29. The Oregon Supreme Court does appoint a professional responsibility board that institutes the

OSB's disciplinary proceedings (ORS 9.532, 9.534), as well as a board of bar examiners (ORS 9.210(1)), but it does not control those boards' operation.

The Recommendation erred in stating that "[t]he Supreme Court also approves the Bar's budget for admissions, discipline, and continuing legal education programs in conjunction with the budgets of other Bar activities. Bylaws § 7.202." (ER-26) In fact, the OSB itself "establish[es] each year the budget of the [OSB's] admissions, discipline and Minimum Continuing Legal Education programs in conjunction with the budgets of the other activities of the [OSB]," while the Supreme Court is limited to approving only the budget related to "admissions, discipline and Minimum Continuing Legal Education" – not "other activities." Bylaws § 7.202.

Because the ultimate governmental authority for regulating the legal profession lies with the Oregon Supreme Court, not OSB, and the OSB acts independently of the state in exercising its own functions, the second *Mitchel*l factor weighs against a finding of immunity.

C. The OSB may sue and be sued.

The Recommendation rightly recognized that the OSB can sue and be sued under ORS 9.010(5). (ER-27)This should have led the Recommendation to conclude that the third *Mitchell* factor weighs against immunity. See *Savage*, 343

F.3d at 1048-49 (school districts' "power to sue or be sued in their own name … weigh[ed] against" immunity). Nonetheless, the Recommendation concluded that "this factor does not argue against immunity from suit in federal court" because state law grants the OSB, its officers, and related entities immunity from civil liability for certain activities. Recommendation at 15, citing ORS 9.537. But the OSB's statutory immunity against certain civil actions is irrelevant to the third *Mitchell* factor, which considers only whether an entity can sue and be sued in its own capacity—i.e., separately from the state government. See *Savage*, 343 F.3d at 1049 (entity's capacity to be sued "was underscored … by the absence of the [state] Attorney General's participation in the lawsuit"). There is no dispute that the OSB is such an entity, and the Recommendation therefore erred in not concluding that this factor weighs against immunity.

D. The OSB may take property in its own name, not the name of the state.

In analyzing the fourth *Mitchell* factor—whether the OSB can take property in its own name—the Recommendation again acknowledged that the factor should weigh against immunity but then erroneously concluded that it did not. The Recommendation correctly acknowledged that the OSB has the power to take property in its own name under ORS 9.010 and that this should weigh against

immunity. ER-27, citing *Beentjes*, 397 F.3d at 784.

Nevertheless, the Recommendation ultimately concluded that this factor "fails to demonstrate lack of immunity" for OSB, apparently because the OSB's power to take property is "in furtherance of its objectives which are classified as governmental functions" and because "while the Bar may take possession of abandoned client funds held in trust accounts, those funds belong to the State." ER-27, citing ORS 98.386(2), 98.304.

The Recommendation erred by focusing on OSB's supposed use of its property for "governmental functions," which might be relevant to the second factor of the *Mitchell* analysis but has no bearing on the fourth factor, which is concerned only with whether an entity "has power to hold property in its own name" rather than the state's name. *Savage*, 343 F.3d at 1049.

Further, the Recommendation's finding that abandoned client funds in the OSB's possession "belong to the State" was erroneous; the cited statutes do not support it. See ORS 98.386(2) ("amounts identified … shall be paid or delivered … to the Oregon State Bar" and "[a]ll amounts paid or delivered to the Oregon State Bar … are continuously appropriated to the Oregon State Bar."). And the state's imposition of certain responsibilities on the OSB in exchange for receiving certain abandoned client funds is irrelevant to the question of whether the OSB can

take property in its own name. See *Savage*, 343 F.3d at 1049-50 (school district could hold property in its own name, and the fourth *Mitchell* factor weighed against immunity, notwithstanding state legislation controlling the district's use of certain monies and the state's provision of certain property with "restrictions attached"). Again, it is beyond dispute that it can.

E. The OSB's corporate status weighs against immunity.

Finally, the Recommendation erred in concluding that the OSB's corporate status favors immunity based on a statute declaring the OSB to be "a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon," ORS 9.010, and a court decision that identified the OSB as a "state agency" under the Oregon Public Records Law's definition of that term, *State ex rel. Frohnmayer v. Oregon State Bar*, 307 Or. 304, 309, 767 P.2d 893, 895 (1989). (ER-28)

The Recommendation erred in treating the state's description of the OSB as dispositive. In *Keller*, the Supreme Court made clear that a state's categorization of a bar association as a "government" entity is not conclusive for purposes of federal constitutional law. The Court explained that, while "the Supreme Court of California is the final authority on the 'governmental' status of the State Bar of California for purposes of state law, … its determination that [the Bar] is a

'government agency,' and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on [federal courts] when such a determination is essential to the decision of a federal question." 496 U.S. at 11. *Keller* then concluded that, for First Amendment purposes, a mandatory state bar association is more analogous to a labor union than to any kind of governmental unit. *Id*.

Moreover, the Recommendation disregarded Oregon's classification of "[a] public corporation created under a statute of this state and specifically designated as a public corporation," such as the OSB, as a "special government body." ORS 174.117(1). Other examples of special government bodies in Oregon include school districts, education service districts, intergovernmental bodies formed by two or more public bodies, and entities created by statute, ordinance or resolution that are not part of state or local government. ORS 174.117(1).

Further, the OSB is exempt from most requirements that apply to state agencies, departments, boards, commissions, and public bodies, and its employees are not state employees.[3] See ORS 9.010, 9.080(4). And, again, OSB is supervised by its Board and enforces the Board's Bylaws. The state's minimal control over the

[3]For example, the state does not list the individual Defendants in this case as state employees with respect to their positions with the OSB or its Board. *State Employee List (Alphabetical),* available at https://dasapp.oregon.gov/statephonebook/personnellisting.pdf.

OSB points towards independence from the state. See *Beentjes*, 397 F.3d at 785 ("the State exercises little control over the structure and operation of the districts, which suggests that districts function independently from the State") (internal quotations omitted).

Therefore, the Recommendation erred in not concluding that the final *Mitchell* factor—like all of the other *Mitchell* factors—weighs against a finding of Eleventh Amendment immunity for the OSB.

CONCLUSION

The order of the trial court should be overruled and the case remanded for further proceedings consistent with the Court's opinion.

REQUEST FOR ORAL ARGUMENT

Under Local Rule 34(a), Appellant respectfully submits that oral argument should be heard in this appeal. The appeal presents issues of first impression concerning the constitutionality of integrated associations of "legal services" "professionals." Certainly, before additional associations of the kind addressed in this case are created, the constitutionality of such associations should be carefully addressed and considered.

September 3, 2019

Respectfully submitted,

/s/ Michael L. Spencer
Michael L. Spencer, OSB #830907
403 Main St.
Klamath Falls, OR 97601
(541) 883-7139
mlslaw@live.com

Statement of Related Cases

19-35463
Daniel Crowe, et al v. Oregon State Bar, et al

CERTIFICATE OF COMPLIANCE

This brief complies with the word-length limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(I). This brief contains less than 7,250 words, excluding the portions outlined in Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using WordPerfect and 14-point Times New Roman type.

Dated: September 3, 2019

/s/ Michael L. Spencer
Michael L. Spencer, OSB #830907

CERTIFICATE OF SERVICE

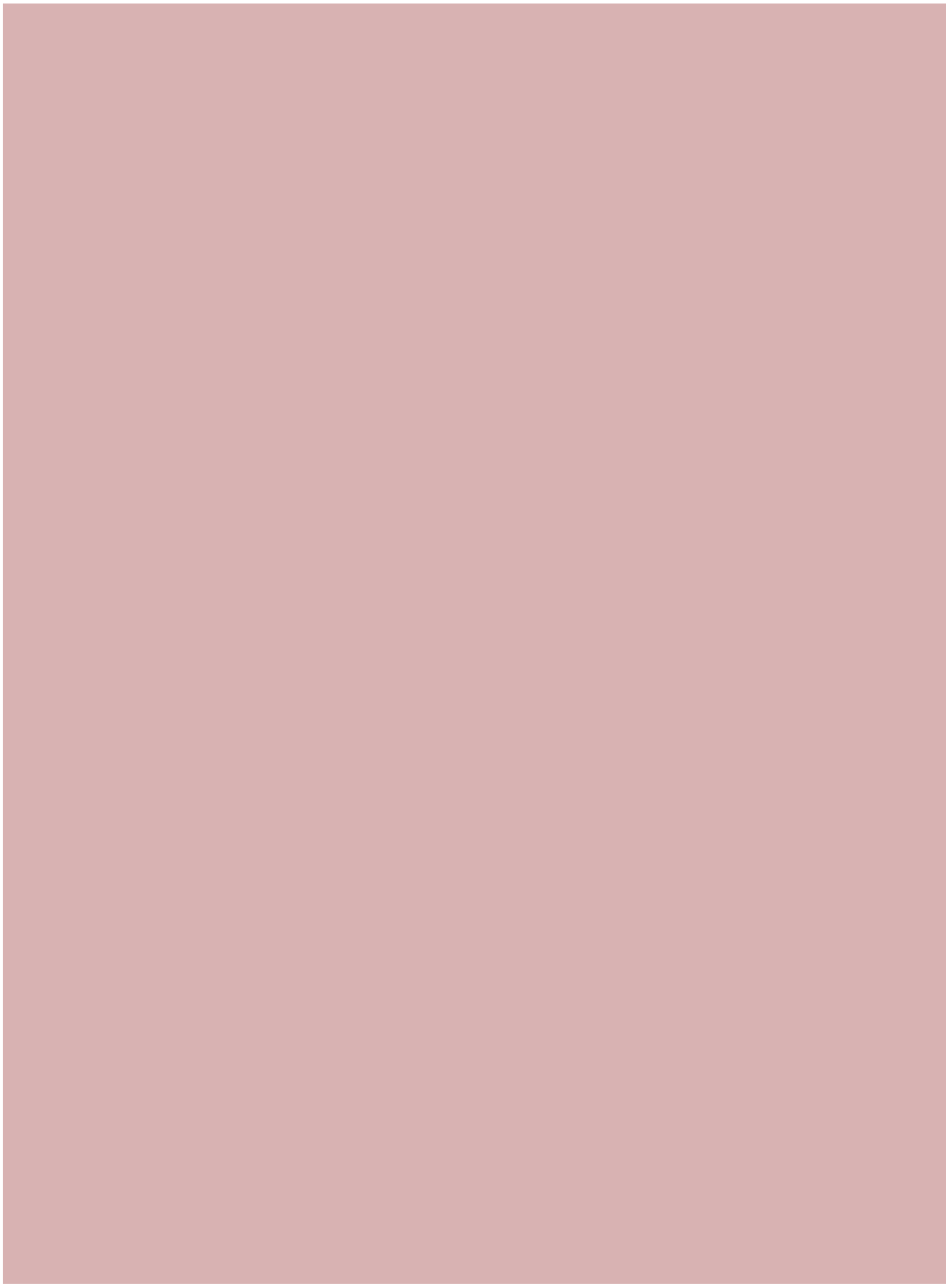
I

I hereby certify that on September 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 3, 2019

/s/ Michael L. Spencer
Michael L. Spencer, OSB #830907



ADDENDUM TO BRIEF

Constitutional Provisions:

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes:

28 U.S.C. §1291

he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

9.010 Status of attorney and Oregon State Bar; applicability of statutes.

(1) An attorney, admitted to practice in this state, is an officer of the court.

(2) The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon. The bar is authorized to carry out the provisions of ORS 9.005 to 9.757.

(3) The bar is subject to the following statutes applicable to public bodies:

(a) ORS 30.210 to 30.250.

(b) ORS 30.260 to 30.300.

(c) ORS 30.310, 30.312, 30.390 and 30.400.

(d) The Oregon Rules of Civil Procedure.

(e) ORS 192.311 to 192.478.

(f) ORS 192.610 to 192.690.

(g) ORS 243.401 to 243.507.

(h) ORS 244.010 to 244.040.

(i) ORS 297.110 to 297.230.

(j) ORS chapters 307, 308 and 311.

(k) ORS 731.036 and 737.600.

(4) Except as provided in subsection (3) of this section, the bar is not subject to any statute applicable to a state agency, department, board or commission or public body unless the statute expressly provides that it is applicable to the Oregon State Bar.

(5) The Oregon State Bar has perpetual succession and a seal, and may sue and be sued. Notwithstanding the provisions of ORS 270.020 and 279.835

to 279.855 and ORS chapters 278, 279A, 279B and 279C, the bar may, in its own name, for the purpose of carrying into effect and promoting its objectives, enter into contracts and lease, acquire, hold, own, encumber, insure, sell, replace, deal in and with and dispose of real and personal property.

(6) No obligation of any kind incurred or created under this section shall be, or be considered, an indebtedness or obligation of the State of Oregon.

9.025 Board of governors; number; eligibility; term.

(1)(a) The Oregon State Bar shall be governed by a board of governors consisting of 19 members:

(A) Fourteen of the members shall be active members of the Oregon State Bar elected from the regions established under subsection (2)(a) of this section. A member elected under this subparagraph must maintain the member's principal office in the region for which the member seeks election throughout the member's candidacy and term of office.

(B) One member shall be an active member of the Oregon State Bar elected from the region established under subsection (2)(b) of this section. The member elected under this subparagraph must maintain the member's principal office in the region established under subsection (2)(b) of this section throughout the member's candidacy and term of office.

(C) Four of the members shall be appointed by the board of governors from among the public. The public members must be residents of this state throughout their terms of office and may not be active or inactive members of the Oregon State Bar.

(b) A person charged with official duties under the executive and legislative departments of state government, including but not limited to elected officers of state government, may not serve on the board of governors. Any other person in the executive or legislative department of state government

who is otherwise qualified may serve on the board of governors.

(2) The board of governors shall establish regions for the purpose of electing board members as follows:

(a) The board shall divide the State of Oregon into regions for the purpose of electing board members described in subsection (1)(a)(A) of this section. Regions established under this paragraph must be based on the number of attorneys who have their principal offices in the region. To the extent that it is reasonably possible, regions established under this paragraph must be configured by the board so that the representation of board members to attorney population in each region is equal to the representation provided in other regions. At least once every 10 years the board shall review the number of attorneys in the regions and shall alter or add regions as the board determines is appropriate in seeking to attain the goal of equal representation.

(b) The board shall establish one region composed of all areas not located in the State of Oregon for the purpose of electing the board member described in subsection (1)(a)(B) of this section.

(3) Members of the board of governors may be elected only by the active members of the Oregon State Bar who maintain their principal offices in the regions established by the board under subsection (2) of this section. The regular term of a member of the board is four years. The board may establish special terms for positions that are shorter than four years for the purpose of staggering the terms of members of the board. The board must identify a position with a special term before accepting statements of candidacy for the region in which the position is located. The board shall establish rules for determining which of the elected members for a region is assigned to the position with a special term.

(4) A judge of a municipal, state or federal court or any other full-time judicial officer is not eligible for appointment or election to the board of governors.

(5) The term of any member of the board of governors terminates on the

date of the death or resignation of the member or, if the member of the board is required to be a member of the Oregon State Bar, the term terminates on the date:

(a) Of the termination of active membership in the Oregon State Bar for any reason;

(b) When the member discontinues to maintain the principal office of law practice in the region in which it was maintained at the time of the appointment or election of the member; or

(c) When the member assumes office as a judge of a municipal, state or federal court, or fills a full-time judicial office.

(6) A member of the board of governors is not eligible during the member's term of office for service pro tempore as a judge of any municipal, state or federal court.

9.040 Election of governors; rules; vacancies.

(1) The election of governors shall be held annually on a date set by the board of governors. Any member of the Oregon State Bar who is eligible to serve as a governor for a region may file a signed statement of candidacy for the region. Statements of candidacy must be filed with the chief executive officer of the bar. The board shall establish a deadline for filing statements of candidacy.

(2)(a) The bar shall distribute ballots containing the names of the candidates for the office of governor in each region to every active member in the region. Voting must be completed on or before the day of the election. The chief executive officer shall canvass the votes and record the results of the election.

(b) The board by rule may provide for electronic elections under paragraph (a) of this subsection. Rules adopted under this paragraph may provide for electronic distribution of election materials and electronic tabulation of votes.

(3) In a region in which only one position is to be filled, the candidate receiving the highest vote shall be declared elected. If a region has more than one position to be filled, the candidate with the most votes received shall be declared elected, the candidate with the next highest number of votes received shall then be declared elected, and so on until all positions are filled. The balloting shall be conducted so that only eligible active members can vote, and the secrecy of the ballot shall be preserved.

(4) Notwithstanding subsection (1) of this section, the board may not conduct an election for a region if the number of candidates for the region is equal to or less than the number of open positions for the region. If the number of candidates for the region is equal to or less than the number of open positions for the region, the board shall declare the candidate or candidates elected on a date specified by the board.

(5) A vacancy in the office of elective member of the board of governors that occurs more than 24 months before the expiration of the term shall be filled for the remainder of the term by a governor elected at a special election held in the manner provided in this section as soon as possible after the occurrence of the vacancy, or as provided in subsection (4) of this section if there is only one candidate. The vacancy may be filled for the period between the occurrence of the vacancy and the election of a new governor by a person appointed by the board. A vacancy in the office of elective member that occurs 24 months or less before the expiration of the term shall be filled for the remainder of the term by a person appointed by the board.

(6) A vacancy in the office of public member of the board of governors shall be filled for the remainder of the term by a governor appointed by the board.

9.055 Chief executive officer.

The board of governors shall appoint a chief executive officer of the Oregon State Bar. The chief executive officer is the chief administrative employee of the bar. The chief executive officer may, but need not, be a member of the bar. The chief executive officer serves at the board's discretion and shall perform such duties as the board prescribes.

9.080 Duties of board of governors; professional liability fund; quorum; status of employees of bar.

(1) The state bar shall be governed by the board of governors, except as provided in ORS 9.136 to 9.155. The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. It has the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law.

(2)(a)(A) The board has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and is empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.

(B) The board has the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to the professional liability fund and to establish the date by which contributions must be made.

(C) The board has the authority to establish definitions of coverage to be provided by the professional liability fund and to retain or employ legal counsel to represent the fund and defend and control the defense against any covered claim made against the member.

(D) The board has the authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under the professional liability fund, either through the fund, through a separate fund or through any insurance organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State of Oregon.

(E) Records of a claim against the professional liability fund are exempt from disclosure under ORS 192.311 to 192.478.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

(c) For the purposes of paragraph (a) of this subsection, the principal office of an attorney is considered to be the location where the attorney engages in the private practice of law more than 50 percent of the time engaged in that practice. In the case of an attorney in a branch office outside Oregon and the main office to which the branch office is connected is in Oregon, the principal office of the attorney is not considered to be in Oregon unless the attorney engages in the private practice of law in Oregon more than 50 percent of the time engaged in the private practice of law.

(3) The board may appoint such committees, officers and employees as it deems necessary or proper and fix and pay their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then in office shall constitute a quorum. It shall promote and encourage voluntary county or other local bar associations.

(4) Except as provided in this subsection, an employee of the state bar shall not be considered an "employee" as the term is defined in the public employees' retirement laws. However, an employee of the state bar may, at

the option of the employee, for the purpose of becoming a member of the Public Employees Retirement System, be considered an "employee" as the term is defined in the public employees' retirement laws. The option, once exercised by written notification directed to the Public Employees Retirement Board, may not be revoked subsequently, except as may otherwise be provided by law. Upon receipt of such notification by the Public Employees Retirement Board, an employee of the state bar who would otherwise, but for the exemption provided in this subsection, be considered an "employee," as the term is defined in the public employees' retirement laws, shall be so considered. The state bar and its employees shall be exempt from the provisions of the State Personnel Relations Law. No member of the state bar shall be considered an "employee" as the term is defined in the public employees' retirement laws, the unemployment compensation laws and the State Personnel Relations Law solely by reason of membership in the state bar.

9.210 Board of bar examiners; fees of applicants for admission to bar.

(1) The Supreme Court shall appoint a board of bar examiners to carry out the admissions functions of the Oregon State Bar as set forth in the bar bylaws and the rules of the Supreme Court. The composition of the board of bar examiners shall be as provided in the rules of the Supreme Court, but the board must include at least two public members.

(2) The board shall examine applicants, investigate applicants' character and fitness and recommend to the Supreme Court for admission to practice law those who fulfill the requirements prescribed by law and the rules of the Supreme Court.

(3) With the approval of the Supreme Court, the board may fix and collect fees to be paid by applicants for admission, which fees shall be paid into the treasury of the bar.

(4) Applications for admission and any other material pertaining to individual applicants are confidential and may be disclosed only as provided in the rules of the Supreme Court. The board's consideration of an individual applicant's qualifications is a judicial proceeding for purposes of

ORS 192.610 to 192.690.

9.220 General requirements for admission.

An applicant for admission as attorney must apply to the Supreme Court and show that the applicant:

(1) Is at least 18 years old, which proof may be made by the applicant's affidavit.

(2)(a) Is a person of good moral character and fit to practice law.

(b) For purposes of this section and ORS 9.025, 9.070, 9.110, 9.210, 9.250 and 9.527, the lack of "good moral character" may be established by reference to acts or conduct that reflect moral turpitude or to acts or conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation. The conduct or acts in question should be rationally connected to the applicant's fitness to practice law.

(3) Has the requisite learning and ability, which must be shown by the examination of the applicant, by the judges or under their direction. However, no rule shall establish any maximum on the number of times an applicant may apply for and take the bar examination whenever presented if the reason for refusing admission to practice law is failure to pass the bar examination.

9.250 Order for admission; oath of qualified applicant.

(1) If the Supreme Court finds that an applicant for admission as an attorney is 18 years of age or more, is of good moral character and fit to practice law, and possesses the requisite learning and ability to practice as an attorney in all the courts of this state, the court shall enter an order that the applicant be admitted to practice as an attorney. The order shall specify that admission take effect upon the applicant taking the oath required by subsection (2) of this section.

(2) The applicant shall execute a written oath that in the practice of law the applicant will support the Constitution and laws of the United States and of this state, and be of faithful and honest demeanor in office. The applicant is entitled to practice as an attorney after the State Court Administrator has received the oath executed under this subsection.

9.261 Resignation of attorney.

(1) An attorney may resign from membership in the bar pursuant to rules adopted by the board under ORS 9.542. After acceptance of the resignation by the Supreme Court, the attorney shall not be entitled to the rights nor subject to the disabilities or prohibitions incident to membership, except that the attorney is still subject to the power of the court in respect to matters arising prior to the resignation.

(2) An attorney who has resigned may be readmitted to practice only in compliance with rules adopted pursuant to ORS 9.542.

9.527 Grounds for disbarment, suspension or reprimand.

The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

(1) The member has committed an act or carried on a course of conduct of such nature that, if the member were applying for admission to the bar, the application should be denied;

(2) The member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of the conviction shall be conclusive evidence;

(3) The member has willfully disobeyed an order of a court requiring the member to do or forbear an act connected with the legal profession;

(4) The member is guilty of willful deceit or misconduct in the legal

profession;

(5) The member is guilty of willful violation of any of the provisions of ORS 9.460 or 9.510;

(6) The member is guilty of gross or repeated negligence or incompetence in the practice of law; or

(7) The member has violated any of the provisions of the rules of professional conduct adopted pursuant to ORS 9.490.

9.532 State professional responsibility board.

The Supreme Court shall appoint a state professional responsibility board to institute disciplinary proceedings of the Oregon State Bar against members of the bar, as provided in the bar bylaws and the rules of the Supreme Court.

9.534 Disciplinary board; procedure before board; oaths; subpoenas; hearing; record.

(1) The Supreme Court shall appoint a disciplinary board, which may include one or more professional adjudicators as set forth in the rules of the Supreme Court and the Oregon State Bar bylaws, to adjudicate disciplinary proceedings of the bar.

(2) A member, formally accused of misconduct by the bar, shall be given reasonable written notice of the charges against the member, a reasonable opportunity to defend against the charges, the right to be represented by counsel, and the right to examine and cross-examine witnesses. The member has the right to appear and testify, and the right to the issuance of subpoenas for attendance of witnesses and the production of books, papers or documents in the defense of the member.

(3) Rules of evidence and discovery in disciplinary proceedings shall be as provided in the rules of procedure.

(4)(a) The disciplinary board has the authority to take evidence, administer

oaths or affirmations, and issue subpoenas to compel the attendance of witnesses, including the accused member, and the production of books, papers and documents pertaining to the matter before the disciplinary board.

(b) A witness in a disciplinary proceeding who testifies falsely, fails to appear when subpoenaed, or fails to produce any books, papers or documents pursuant to subpoena, is subject to the same orders and penalties to which a witness before a circuit court is subject. Subpoenas issued pursuant to paragraph (a) of this subsection may be enforced by application to any circuit court.

(c) Any member of the disciplinary board may administer oaths or affirmations and issue any subpoena provided for in paragraph (a) of this subsection.

(5) The hearing before the disciplinary board shall be held in the county in which the member charged maintains an office for the practice of law, the county in which the member resides, or the county in which the offense is alleged to have been committed. With the consent of the member, the hearing may be held elsewhere in the state.

(6) A record of all hearings shall be made and preserved by the disciplinary board.

9.537 Civil immunity of witnesses, bar officials and employees.

(1) Any person who has made a complaint to the bar concerning the conduct of an attorney, or who has given information or testimony in or relative to a proposed or pending admission, reinstatement or disciplinary proceeding is absolutely immune from civil liability for any such acts.

(2) The Oregon State Bar and its officers, the members of the state professional responsibility board, the board of bar examiners, the board of governors and the disciplinary board, bar counsel, investigators, disciplinary monitors, mentors and employees of the bar are absolutely immune from civil liability in the performance of their duties relative to proposed or pending admission, professional licensing requirements, reinstatement or

disciplinary proceedings.

174.117 "Special government body" defined.

(1) Subject to ORS 174.108, as used in the statutes of this state "special government body" means any of the following:

(a) A public corporation created under a statute of this state and specifically designated as a public corporation.

(b) A school district.

(c) A public charter school established under ORS chapter 338.

(d) An education service district.

(e) A community college district or community college service district established under ORS chapter 341.

(f) An intergovernmental body formed by two or more public bodies.

(g) Any entity that is created by statute, ordinance or resolution that is not part of state government or local government.

(h) Any entity that is not otherwise described in this section that is:

(A) Not part of state government or local government;

(B) Created pursuant to authority granted by a statute, ordinance or resolution, but not directly created by that statute, ordinance or resolution; and

(C) Identified as a governmental entity by the statute, ordinance or resolution authorizing the creation of the entity, without regard to the specific terms used by the statute, ordinance or resolution.

(i) A public university listed in ORS 352.002.

(2) Subject to ORS 174.108, as used in the statutes of this state "special government body" includes:

(a) An entity created by statute for the purpose of giving advice only to a special government body;

(b) An entity created by a special government body for the purpose of giving advice to the special government body, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by a special government body described in subsection (1) of this section, other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the special government body.

Rules

FRCP 12 Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d),

within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. if a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed ? but early enough not to delay trial ? a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. if the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.
(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule l2(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
(B) failing to either:

(i) make it by motion under this rule; or
(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or
(C)at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule l2(b)(1)-(7) - whether made in a pleading or by motion - and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Ohio Gov. Bar Rule VI §14 Attorney Services Fund.

(A) Collection and use of fees. Except as otherwise provided in these rules, all fees collected pursuant to these rules shall be deposited in the Attorney Services Fund. Moneys in the fund shall be used for the following purposes:

(1) The investigation of complaints of alleged misconduct pursuant to Gov. Bar R. V or Gov.Jud.R. II and the investigation of the alleged unauthorized practice of law pursuant to Gov. Bar R. VII;
(2) To support the activities of the Lawyers' Fund for Client Protection established under Gov. Bar R. VIII;
(3) To support the activities of the Commission on Continuing Legal Education pursuant to Gov. Bar R. X;
(4) For matters approved by the Court and relating to the admission of applicants to the practice of law or relating to the certification of Foreign Legal Consultants and for the administration and operation of all of the following:

(a)The Board of Bar Examiners;
(b)The Board of Commissioners on Character and Fitness, including the fees and expenses of special investigators appointed by the Board under Gov. Bar R. I, Sec. 10(B)(2)(f);
(c)The admissions committees, provided, however, that such use of the funds shall be limited to reimbursing admissions committees for costs incurred in conducting investigations under Gov. Bar R. I, Sec. 11.

(5)Any other purposes considered necessary by the Supreme Court for the government of the bar and of the judiciary of Ohio;
(6) To support any other activities related to the administration of justice considered necessary by the Supreme Court.

(B) Transfer of funds to Treasurer of State. In addition to the purposes set forth in division (A) of this section, moneys in the Attorney Services Fund may be transferred to the credit of the Supreme Court Attorney Services Fund in the state treasury. Investment earnings on moneys transferred to the Supreme Court Attorney Services Fund in the state treasury shall be credited to that fund.

(C) Annual Report. On or before the first day of November each year, the Administrative Director of the Supreme Court shall prepare and publish a report on the activity of the Attorney Services Fund.

OSB ByLaws Section 2.1 Duties and Responsibilities

Subsection 2.100 General

(a) The Board of Governors governs the Bar, except as provided in ORS 9.139. In doing so, the Board determines the general policies of the Bar and approves its budget each year. The Chief Executive Officer, appointed by and acting under the supervision of the Board, implements, administers and supervises the Bar's operation and program activities within these Bylaws and ORS Chapter 9.
(b) The Board operates as a review body, a supervisor of top management performance and a representative body of all members. As such, the Board must plan for the welfare of the total Bar ahead of other considerations.
(c) Each board member is unique and contributes special talents to the successful governance of the Bar. Expressing viewpoints and sharing opinions on issues before the Bar is important.
(d) Each lawyer-board member represents a geographic constituency. As a representative, a lawyer-board member is expected to communicate with constituents about board actions and issues and to represent constituent viewpoints to the Board.
(e) In addition to each lawyer-board member's individual responsibility for

communication with his or her constituency as set out in subparagraph (D) above, lawyer members of the Board and staff will have the responsibility to meet with local associations and other lawyer groups. Each year the President and Chief Executive Officer will develop a plan to visit the groups mentioned above with substantial participation by both the President and the Chief Executive Officer.

(f) Board members are committed to attend all board meetings and other functions in person except when, in a board member's judgment, an emergency or compelling circumstance arises that prevents participation. Board members should notify staff of the desire to participate in board meetings by telephone when personal attendance is precluded by an emergency or compelling circumstance. Staff will arrange the telephone link at bar expense based on those requests.

OSB ByLaws Section 7.2 Annual Budget

The Chief Executive Officer will develop a draft annual budget for review and approval by the Budget and Finance Committee. The Budget and Finance Committee will submit its recommendation for final approval to the Board.

Subsection 7.200 Approval by Board of Governors

After the annual budget is adopted, the Board must approve a substantive programmatic change not anticipated or included in the budget.

Subsection 7.201 Contingency Fund

A contingency fund will be established within the annual operating budget of the Bar, as a line item equal to one percent of the annual expenditure budget. The contingency fund is to be used for unanticipated expenditures that were not identified in the normal budget process. All expenditures from the contingency fund must be approved by the Board.

Subsection 7.202 Approval by Supreme Court

The Board will establish each year the budget of the Bar's admissions, discipline and Minimum Continuing Legal Education programs in

> conjunction with the budgets of the other activities of the Bar. The admissions, discipline and Minimum Continuing Legal Education components of the Board's preliminary budget for the following year must be submitted to the Chief Justice of the Oregon Supreme Court for review and approval by the court. Any changes made by the court in the preliminary budgets of the Bar's admissions, discipline and Minimum Continuing Legal Education programs must be incorporated into the final budget approved by the Board. Additional provisions pertaining to the development and approval of the budget for the admissions component are set out in Article 28.

OSB ByLaws Section 29 Amendment of Bylaws

> Any amendment of the Bar's Bylaws requires notice at a prior Board meeting unless two-thirds of the entire Board waives the notice requirement. The Bar's Bylaws may be amended by affirmative vote of a majority of the entire Board at any regular meeting or at any special meeting of the Board called for that purpose.

Marilyn Cavicchia, Newly Formed California Lawyers Association Excited to Step Forward, ABA Journal, Apr. 30, 2018.

Chances are, you've heard something about the "state bar act" —effective January 1 of this year—that formalized a split in which the State Bar of California retained only its regulatory and public protection functions, ending years of debate over what the state bar's role should be.

You may also have heard about something else that occurred as part of that split: the formation of a new statewide organization called the California Lawyers Association. Bar Leader recently spoke with the first-ever president of the CLA, Heather Linn Rosing, about the new organization and its current focus.

Though the structure of the CLA is new, Rosing pointed out that the 16 sections and the young lawyers' group (the California Young Lawyers Association) that were moved out of the state bar had been thriving "for decades." By bringing them together under the CLA umbrella, the new organization began with more than 60,000 members.

When asked about the CLA's top priorities for the first year, Rosing talked about some nuts and bolts, but she also shared this bold vision: "Our goal is to be one of the preeminent bar associations in the country."

But can a bar association with such a strong section emphasis inspire members to feel connection and loyalty to the overall organization as well? And how will this new voluntary statewide organization interact with the other voluntary bars in the state?

First things first

This year, the CLA is tackling a host of infrastructure matters—such as hiring its own staff and voting to base itself in Sacramento. (Currently, both its staff and space are via an arrangement with the State Bar of California, operating out of the state bar's offices in San Francisco.) Beyond that, Rosing said she has a list of 20 things the CLA is "heavily committed to developing" but that these are the current top four:

"Significant events," such as an annual meeting, which Rosing said the State Bar of California had for many years, drawing 4,000 attendees at its peak. The CLA is planning a two-day annual meeting in September 2018 in San Diego, and hopes to hold its 2019 annual meeting in Monterey. Also in 2019, the CLA plans to hold a solo and small firm summit; because there's a tie to public protection, Rosing noted, the bar hopes to partner with the State Bar of California on this event.

Diversity, inclusion, and equity in the bar, the profession, and in access to justice. The CLA has a committee focused on these issues, Rosing said, and the fact that she is currently also president of the California Bar Foundation gives her additional knowledge and resources to draw from.

Governmental affairs and advocacy, another focus for which there's a CLA committee. A group that was a subset of the 16 state bar sections had been proposing and commenting on state legislation, but now, Rosing said, there is a statewide bar organization that is able to be "the voice of the legal community in California" and also to show support for the judiciary.

Pro bono. The CLA wants to partner with legal services organizations

throughout the state, serving as a clearinghouse for pro bono opportunities in California.

Collaboration, partnership are important

Rosing, herself a past president of the San Diego County Bar Association, acknowledged that there are many local bar associations throughout the state, with an unusually well-organized statewide group of bar executives—the Executives of California Lawyers' Associations. She said ECLA has been "totally receptive" to the idea of collaborating with the CLA and, in fact, has invited the new bar organization to its meeting in May. The CLA is forming a bar collaboration committee, she added, and wants to approach other bar associations throughout the state as "equal partners" in advocacy and other areas of shared priority. The CLA also plans to hold a bar leadership conference in 2019, she noted.

Collaboration with the State Bar of California will continue, Rosing said, even after the CLA makes its move to Sacramento. For example, once the state bar hires a new diversity director—to replace Pat Lee, who is retiring—Rosing expects that the CLA's diversity committee will be in close contact with him or her. Another area of potential collaboration, she said, is in continuing legal education—because the state bar has a vested interest in whether California lawyers are proficient and up to speed. And rather than feeling territorial over its remaining functions, Rosing said, the state bar is actively looking to shift at least one more to the CLA—an awards program that may no longer be the best fit.

Currently, and for the foreseeable future, the only way to join the CLA is by also joining either a section or the CYLA. So, what will encourage members to come together and think of themselves as one bar, rather than affiliating only with their interest groups? Acknowledging and tapping into the "awesome, robust" power of the sections, Rosing said, helps to make a case for a feeling of pride in the association. Also, she said, many section leaders had longed to be united under a statewide organization that had more "flexibility" than the State Bar of California could offer.

"They're interested and energized [regarding the CLA as a whole]," she believes. "We're getting a lot of great responses."

What's next?

Rosing said there's a "strong likelihood" that the CLA will form a bar foundation someday, given that the organization has an interest in philanthropy. In the nearer future, expect to see staff and elected leaders of the CLA at meetings of the National Association of Bar Executives and National Conference of Bar Presidents, and possibly at the ABA Bar Leadership Institute. The bar is also talking with the ABA about how to gain a seat in the House of Delegates.

Again, Rosing said, in many ways what happens next is a continuation of what the sections and CYLA have always done. "Now," she said, "they'll have a chance to do what they always wanted to do before—and much more."